SPEECH

OF

HON. C. R. BUCKALEW,

OF PENNSYLVANIA,

ON THE

EXECUTIVE POWER TO MAKE REMOVALS FROM OFFICE;

DELIVERED

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REMOVALS FROM OFFICE.

The Senate having under consideration the bill (S. No. 453) to regulate the tenure of offices—

Mr. BUCKALEW said:

Mr. PRESIDENT: I listened yesterday with very much of interest and attention to the remarks of the Senator from Oregon [Mr. WILLIAMS] in support of the bill before the Senate; but I listened in vain for a statement by him, distinctly and clearly made, of the ground of power upon which this bill was reported and its passage proposed. I understood him, however, at one stage of his argument to take the ground which was originally taken when this question was discussed in the Congress of 1789 by most of those who then opposed the construction given to the Constitution upon this subject, to wit: that the power of removing from office in our Government arose by implication from the provision which confers upon the President the power of appointment, "by and with the advice and consent of the Senate." If this bill be pressed upon that ground, upon the ground that there is an implied power in the President and the Senate to remove from office because they are joined together for the purpose of appointment, it will inevitably follow that this bill will stand condemned: it cannot be justified upon the ground which is stated in its support.

Mr. President, there are but two possible locations in this Government for the power of removal under the Constitution of the United States; and I say this in view of former discussions and in view of the expressed opinions of leading men at different periods of our history, both those who have been concerned in the enactment and execution of the laws and those who have written expositions of the Constitution as scholars in the retiracy of their closets.

If this power to remove be one conferred by the Constitution, it must be vested in the President of the United States alone, who is the head of the executive department and charged with the execution of the laws, or it must be vested in the President by and with the advice and consent of the Senate upon the ground of implication which I have already mentioned. If the power be not vested in the President alone or in the President and the Senate, it is located nowhere; it exists nowhere; and the argument in favor of the enactment of a law proposing to vest it anywhere must be upon the ground that it is an ideal or latent power which may be created or called into active existence by virtue of those general powers of legislation which are vested in the Congress of the United States. But inasmuch as this is a Government of granted and vested powers, and inasmuch as the grants to Congress are specific, upon the very statement of the point itself the conclusion must be against it. We must reject the argument and recur back to the alternative before mentioned. Before I am done I will read authorities upon these several points by which my statement of them will be fully vindicated.

I say, then, that the Senator from Oregon, in his argument in favor of this bill, was not satisfactory in his statement of the ground of power upon which he claimed that we could enact it. Taking for granted that he stands upon the ground that this is a power arising by implication and by virtue of the Constitution vested in the President and in the Senate, how stands his bill? Why, sir, upon that implication this power must be exclusive in the President and in the Senate; neither can divest themselves of it; nor can the law-making power charge its exercise upon one to the exclusion of the other. And yet what does this bill do? You propose by law to provide that the President shall suspend from office—an exercise of the power of removal to a certain extent, and standing upon the same grounds of argument as the absolute and complete power of removal itself. If your argument be sound,

you cannot by law provide that the President shall suspend, that he shall make a partial removal from office, without the advice and consent of the Senate before the suspension is made or ordered.

Equally clear is it upon the very face of this bill that the main, the important exception which is made, and properly and necessarily made from it, is in this view unconstitutional, to wit, the exception of the several heads of Departments from the operation of this proposed law. If the President and Senate are by the Constitution united for the purpose of removal as well as appointment, it will follow that you cannot, as you propose by this bill, permit the President alone to remove the heads of the executive Departments—the principal officers who are associated with him in the execution of the laws.

Your bill, then, stands condemned upon this ground, which is the only ground in my opinion that can be with any plausibility urged in its support. The premises from which you proceed will not justify the conclusion at which you arrive.

The bill before us gives to Senators the same participation in removals from office that they possess under the Constitution in cases of appointment. Their "advice and consent" is necessary by the express terms of the Constitution to the appointment of "embassadors, other public ministers and consuls, judges of the Supreme Court," and all other officers of the United States whose appointments are not otherwise provided for in the Constitution, and which may be "established by law." The question now is whether their "advice and consent" is necessary under the Constitution to the removal of such officers, or whether a requirement of such advice and consent to removals may be established by law. The question is one of the first magnitude among all those which can arise in the practical action of the Government, and deserves debate which shall rise above the passions and selfish interests of the hour.

The proposition which has been heretofore maintained by all the great departments of the Government, that is, by Congress, by the President, and by the Supreme Court, has been that all removals from office (except of "inferior officers" whose appointments are vested by law "in the President alone, in the courts of law, or in the heads of Departments") are to be made by the President without any senatorial advice or consent. He is to act alone without check or limitation upon his power or division of his responsibility. And this has been held to be a constitutional principle, secure from molestation by statute.

The President's power of removal was well considered in the First Congress which assembled under the Constitution, and fortunately the debate as well as the decision then made has been preserved to us. There is no express provision in the Constitution on the subject of removals from office, except one under the head of impeachment, which is to be found in the third section of the first article. The power, therefore, if it exist at all, except in the Senate when sitting as a court of impeachment, must be an implied one, and manifestly it must be vested in the President of the United States or in the President and Senate.

That this power is vested in the President alone by the Constitution ought not now to be questioned in view of the past practice of the Government, and of the decisions which have been made by its several departments. But as this bill does question that location of the power, and brings up again the objections which were urged on former occasions against such location, we are obliged once more to traverse the field of debate upon the general subject, and to repel again those arguments which were formerly advanced in favor of senatorial participation in removals.

The most favorable occasion which has ever presented itself for considering and deciding this subject was presented in the Congress of 1789; for the Government was then about to be put in operation. Its organization was just begun. Most of the offices under it were unfilled. There were no private interests to be effected by a construction of the Constitution upon the question of removals from office. Political parties, as they afterward took form, were unknown. General Washington was President, and many leading men who had participated in the forming of the Constitution and in its adoption by the several States were members in both Houses of Congress. This point was put with great propriety and force by one of the members who participated in the debate in the House of Representatives, and who had been prominent in the constitutional convention; I mean Mr. Madison. He said:

"In another point of view it is proper that this interpretation should now take place rather than at a time when the exigency of the case may require the exercise of the power of removal. At present the disposition of every gentleman is to seek the truth and abide by its guidance when it is discovered. I have reason to believe the same disposition prevails in the Senate. But will this be the case when some individual officer of high rank draws into question the capacity of the President, with the Senate, to effect his removal? If we leave the Constitution to take this course it can never be expounded until the President shall think it expedient to exercise the right of removal, if he supposes he has it; then the Senate may be induced to set up their pretensions. And will they decide so calmly as at this time, when no important officer in any of the great departments is appointed to influence their judgments? The imagination of no member here or of the Senate or of the President himself is heated or disturbed by faction. If ever a proper moment for decision should offer, it must be one like the present."—*Annals of Congress*, vol. i, p. 547.

These words of wisdom deserve as much consideration now as they did when uttered, exhibiting as they do in contrast the superic-

competency and fitness of the Congress of 1789, before parties were formed and personal interests in the tenure of offices had come into existence, over the present Congress filled with heated partisans and subject to the influence of thousands of officers deeply interested in the subject of our debates.

The question was decided after full discussion in both Houses in favor of the presidential power of removal under the Constitution, and this decision was indorsed by the signature of President Washington to the bill in which it was contained. And that decision stands unreversed to this day during a period of seventy-seven years. No more authoritative decision upon a constitutional question, open to debate, appears anywhere in our political history, nor one in which there has been more uniform and complete acquiescence by all departments of the Government. Even those public men and jurists who have sometimes suggested their doubts of the propriety or correctness of the decision have acquiesced in its binding force and asserted the impropriety of attempting to disturb it.

It is true that the "pretensions" of the Senate to participate in removals, spoken of by Mr. Madison in the extract just read, were faintly pressed, although not persisted in in the senatorial debates of 1834. At that time Mr. Madison was yet living and gave once more an emphatic expression of his opinion. In a letter to John M. Patton, dated March 24, 1834, he said:

"Should the controversy on removals from office end in the establishment of a share in the power, as claimed for the Senate, it would materially vary the relations among the component parts of the Government, and disturb the operation of the checks and balances now understood to exist. If the right of the Senate be, or be made, a constitutional one, it will enable that branch of the Government to force on the executive department a continuance in office even of the Cabinet officers, notwithstanding a change from a personal and political harmony with the President, to a state of open hostility toward him. If the right of the Senate he made to depend on the Legislature, it would still be grantable in that extent; and even with the exceptions of the heads of Departments and a few other officers, the augmentation of the senatorial patronage, and the new relation between the Senate directly and the Legislature indirectly, with the Chief Magistrate, would he felt deeply in the general administration of the Government. The innovation, however modified, would more than double the danger of throwing the executive machinery out of gear, and thus arresting the march of the Government altogether." * * * * * * *

"The Constitution of the United States may doubtless disclose, from time to time, faults which call for the pruning or the ingrafting hand. But remedies ought to be applied, not in the paroxysms of party and popular excitements, but with the more leisure and reflection as the great departments of power according to experience may he successively and alternately in and out of public favor; and as changes hastily accommodated to these vicissitudes would destroy the symmetry and the stability aimed at in our political system."

In a letter to Edward Coles, dated Montpelier, August 29, 1834, he said:

"For claims are made by the Senate in opposition to the principles and practice of every Administration, my own included, and varying materially, in some instances, the relations between the great departments of the Government."

In a subsequent letter to the same person, dated October 15, 1834, he said:

"You are at a loss for the innovating doctrines of the Senate to which I alluded. Permit me to specify the following:

"The claim on constitutional ground to a share in the removal as well as appointment of officers is in direct opposition to the uniform practice of the Government from its commencement. It is clear that the innovation would not only vary essentially the existing balance of power, but expose the Executive occasionally to a total inaction, and at all times to delays fatal to the due execution of the laws."

Lastly, on this point I quote from his letter to Charles Francis Adams, dated October 13, 1835, being one of the very last letters written by him, in which he said:

"The claims for the Senate of a share in the removal from office, and for the Legislature an authority to regulate its tenure, have had powerful advocates. I must still think, however, that the text of the Constitution is best interpreted by reference to the tripartite theory of government to which practice has conformed, and which so long and uniform a practice would seem to have established.

"The face of the Constitution and the journalized proceedings of the Convention strongly indicate a partiality to that theory, then at its zenith of favor among the most distinguished commentators on the organizations of political power.

"The right of suffrage, the rule of apportioning representation, and the mode of appointing to and removing from office are fundamentals in a free Government and ought to be fixed by the Constitution. If alterable by the Legislature the Government might become the creator of the Constitution of which it is itself but the creature; and if the large States could be reconciled to an augmentation of power in the Senate, constructed and endowed as that branch of the Government is, a veto on removals from office would at all times be worse than inconvenient in its operation, and in party times might, by throwing the executive machinery out of gear, produce a calamitous interregnum.

"In making these remarks I am not unaware that in a country wide and expanding as ours is, and in the anxiety to convey information to the door of every citizen, an unforeseen multiplication of officers may add a weight to the executive scale, disturbing the equilibrium of the Government. I should, therefore, see with pleasure a guard against the evil by whatever regulations having that effect may be within the scope of legislative power: or, if necessary, even by an amendment to the Constitution, when a lucid interval of party excitement shall invite the experiment."

But it was not formally proposed in 1834 that the concurrence of the Senate in removals should be required, although a proposition to that effect was mentioned. The debate was mainly upon a proposition that in case of removals from office by the President he should report his reasons to the Senate. The power in his hands was to be left undisturbed, entire and without limitation. But the question was never pressed to a vote, although the Senate was politically opposed to the President, and much feeling existed with the majority regarding removals which had been made.

That the power of appointment is with the President will appear from considering par-

ticular clauses of the Constitution. The second article declares "that the executive power shall be vested in the President of the United States." By the second section "he shall nominate, and by and with the advice and consent of the Senate shall appoint, all officers of the United States" except such "inferior officers" as Congress may think proper to be appointed "by the President alone, by the courts of law, and by the heads of Departments." Further, "he shall have power to fill up all vacancies that may happen during the recess of the Senate by granting commissions which shall expire at the end of their next session." By the third section of the same article, it is provided, that "he shall take care that the laws be faithfully executed and shall commission all officers of the United States."

Thus it appears that the general mass of executive powers is vested in the President, including the power of appointment to office and the commissioning of offices appointed, and he is charged with the duty of taking care that the laws be duly executed, which has particular reference, as I understand the injunction, to his control or influence over the officers of his department or branch of the Government. And although laws may be enacted for the appointment of certain inferior officers by the heads of Departments, his control or influence is preserved, as to them, by his selection of the heads of Departments who appoint them. For particular reasons, however, not affecting the general argument, certain officials may be selected or appointed by the legislative and judicial departments. Each House of Congress may select their own officers necessary to the transaction of their business, and the officers so selected are not considered to be "officers of the United States" within the language of the Constitution, but simply officers of each House. So subordinate officers of the courts may by law be made appointable by the courts in which they serve, and the President will have but a slight or remote influence over them. For although he appoints the judges, the judicial tenure is during good behavior and the judges cannot be removed by him. Excepting, however, these two classes of subordinate officers in other departments of the Government beside his own, his power of appointment extends directly or indirectly to every officer of the United States at home and abroad. It is a great and extensive power and is appropriately placed in his hands as the executive head of the Government.

But this power is subjected to an important check in that provision of the Constitution which requires the advice and consent of the Senate to all appointments except the subordinate ones before mentioned. He must in all other cases obtain senatorial assent before appointing and commissioning an officer, unless in case of vacancy during a recess of the Senate. I do not understand the act of the Senate in advising and consenting to a nomination to be in any sense an act of appointment. It is simply a permission and recommendation that the appointment shall be made, and the actual appointment and the issuing of a commission to the person appointed, acts executive in their nature, are performed by the President alone. The advice and consent of the Senate does not compel him to make an appointment. It is simply a prerequisite to his exercise of the power and no part of the power itself.

Such appearing to be, upon examination, an exact and just description of the nature and effects of senatorial advice and consent in cases of proposed appointment to office, we are prepared to go on to the main question involved in this debate, which is the question of removals.

It must be manifest to every man of reflection that in any constitution of government there must be provision made for dismissing criminal and incompetent persons from the public service. For without this power it would be impossible to preserve the Government from corruption and imbecility. Our ancestors were not so foolish as to overlook this great necessity, this indispensable requisite, for rendering their work complete. Having established the great departments of the Government, they conferred upon each all the powers necessary to its successful action. The question with which we are now concerned is, what provision did they make for removals from office—for relieving the public service, when necessary, from incompetent and vicious men? The answer to this question is given in part by the fourth section of the second article of the Constitution, which provides that—

"The President, Vice President, and all civil officers of the United States shall be removed from office upon impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors."

By the third section of the first article the Senate has the sole power to try all impeachments, which are to be preferred before it by the House of Representatives, and in case of conviction the judgment shall not extend further than to removal from office and disqualification to hold or enjoy any office of honor, trust, or profit under the United States. The members of the Senate are to sit under oath, and a two-thirds vote is required for a judgment of condemnation. This remedy for official misconduct is certainly extensive in including all civil officers of the United States, but it can be invoked only in case of criminal conduct of a high order of enormity, and is utterly inadequate to the ordinary demands of the public service. As to Senators and Representatives in Congress, who are not liable to impeachment, they can be removed from the

offices by two-thirds votes of the respective Houses to which they belong. Military and naval officers are also excluded from the impeachment power for reasons which need not now be investigated.

Manifestly also the Congress of the United States, by virtue of its general legislative powers, may in certain cases prescribe the punishment of removal from office and disqualifications for holding office, in case of conviction of crime in the courts of the United States. But none of these remedies, important as they are, and necessary to the working of our constitutional system, are sufficient as a check to official delinquency. They are inadequate to secure integrity and efficiency in the administration of the Government, to guard against the innumerable abuses of official life and conduct, and to retain to republican institutions that degree of excellence which is necessary to their popularity and perpetuity. And hence the concession has commonly been made that a power of summary removal from office in addition to those already mentioned must exist somewhere in the Government, and the debate has been not so much upon the existence of the power as upon its particular location. Is it vested in the President, or in the President and Senate, or is it a floating, unlocated, or latent power, which may be defined and located or called into existence by statute law? These are the questions to which we may turn our attention, to which all further debate may be confined.

A strong objection to "advice and consent" by the Senate to removals from office is the incompatibility of such function with the senatorial powers of trying "all impeachments of civil officers of the United States." When acting upon an impeachment the Senate sits as a court and its members are under oath; and the judgment it renders is a judicial judgment, imposing punishment upon the accused if guilty, and completely discharging him from the accusation if innocent. Now, the most indispensable requisite upon the trial of an impeachment is, that the Senate shall be impartial between the Government and the accused; in fact, impartiality is indispensable above every other qualification to a judicial tribunal, and the utmost care is to be exercised in constituting such tribunals in order to secure it.

But if the Senate is to participate in removals from office, if it is to be consulted and its judgment taken in cases of proposed removals, it is manifest that it cannot be an impartial court for the trial of impeachments. Its character as an impartial tribunal for judicial purposes will be destroyed.

In exercising a power or function of advice and consent in questions of removal two classes of cases will arise: first, those where the Senate will advise and consent to a removal; and second, those where their assent will be refused. Let us examine each of these classes in the order mentioned. First, where the Senate upon investigating complaints against a public officer shall be of opinion that the charges are sustained and shall thereupon advise and consent to his removal, the President still may not remove the officer. The preliminary consent of the Senate will not compel, but only permit him to remove. He may change his opinion either upon new evidence presented to him or by reason of fuller reflection upon the case, or, pending the proceeding, a new President may come into office who may disagree in opinion with his predecessor. If for any cause the officer shall not be removed by the President, the House of Representatives may impeach the officer and bring him to the bar of the Senate for trial. But the Senate has already disqualified itself from trying the case as an impartial tribunal. It has already formed and expressed its opinion in the prior proceeding, and it would be an outrage upon justice for it to assume and exercise its duties as a court.

Take another case, a case where a removal is actually made by the President after senatorial advice and consent. The officer is removed from his office, and nothing more. But this punishment for trangression is very different from that which might be adjudged to him upon impeachment. Upon impeachment in a proper case the sentence would include a disqualification for holding office in the future under the United States. So it appears that in acting upon an impeachment of an officer preferred before it, the Senate would impose one form of punishment, while in acting with the President upon the same question of misconduct it would advise and consent to a smaller punishment; to one into which no disqualification for holding office would enter. We need not here determine the question whether an officer thus removed by the President, with senatorial consent, would still be liable to impeachment by the House of Representatives; for whether liable or not the participation of the Senate in his removal stands equally condemned. If no proceeding of impeachment can be instituted against an officer when out of office for a crime or misdemeanor committed by him when in office, it follows that the right of the House to have a judgment of disqualification pronounced upon him is evaded and defeated. If, on the other hand, the House can still prefer articles of impeachment against him and bring him before the Senate for trial, you have again the difficulty of a tribunal already committed in opinion and judgment upon the guilt of the accused, and thereby disqualified for giving him an impartial trial.

Take another case from the second class of cases, according to the division already mentioned—a case of the refusal of consent by the Senate to a removal. The officer remains in

office; the President cannot remove him because the Senate has formed and expressed its opinion in his favor upon all the grounds of charge against him. But the right of the House to prefer articles of impeachment and to demand his removal, if they are sustained by proof, must remain unaffected and in full force. But, as in the former case, the Senate has disqualified itself for entering upon the trial. Its impartiality is gone from it; it is already committed against the prosecution; and its pride, self-respect, and regard for consistency, its feelings, passions, and opinions, all fix it as a partisan of the accused, and commit it to his vindication and support against the impeachment of the House. Under such circumstances a proceeding by the House to bring an offender to justice would be vain, fruitless, absurd.

As regards all cases of this description, the impeachment power might as well as not be struck from the Constitution, for its operation, its vitality is destroyed. It may be said that the Senate, upon a full trial, might change its opinion, might obtain and act upon new views regarding the official conduct of the officer accused. This is not a reasonable supposition; it is opposed to the teachings of experience and to human nature itself. Besides, it is to be remembered that a two-thirds vote is necessary to a judgment of condemnation upon impeachment, whereas a majority merely may advise and consent or refuse their advice and consent to a removal from office by the President. If therefore a majority have refused their consent to a presidential removal and become committed in favor of the officer accused, it is hardly within the bounds of possibility that two thirds should afterward condemn the same officer upon a proceeding of impeachment.

In whatever light, then, you view the alleged power of the Senate to advise and consent to removals from office, it appears utterly inconsistent with its unquestioned power and duty to try all impeachments of "civil officers of the United States." The conclusion is inevitable that the authors of the Constitution, who conferred upon the Senate in express terms the power to try all impeachments, did not intend them or empower them to act in any way whatever in conjunction with the President or as advisers of the President in questions of removal from office; and it is equally clear that so long as the Senate shall be the constitutional tribunal for the trial of impeachments it ought not to be authorized to act upon questions of removal, either to investigate them or to give advice upon them.

This argument, then, founded upon the impeachment clauses of the Constitution, is decisive upon both points of the present inquiry; it is decisive against the existence of this alleged power in the Senate, and also against the policy, the propriety, I had almost said the possibility, of vesting it in the Senate by constitutional amendment or (if that were possible) by statute law.

And this argument might be extended and strengthened by observations upon the impeachability of the President himself and the impropriety of involving him in warm controversies before the very body which may be required to sit in judgment as a court upon his official conduct.

But not only is there no advisory power in cases of removal vested in the Senate by the Constitution, but there could have been no reason for so vesting such power. The Constitution of the Senate does not adapt it to the performance of such duty, and the argument against it, upon this ground, becomes stronger every year. It might have been possible in the earlier years of the Government that the Senate should investigate questions of removal and determine them; for offices were few in number and the cases of removal were rare. Now, however, when offices have multiplied enormously; when they are counted by thousands in each great branch of the public service, civil, military, and naval, and when removals must be frequent and promptly made, it is impossible that the Senate should exercise the advisory power in question intelligently and justly, with convenience to itself or advantage to the public. As much of time is now bestowed by it upon questions of appointment as can be spared from the performance of legislative duties. But in the execution of the duty now charged upon it, it acts summarily, and not with prolonged or thorough deliberation. The evidence before it is partial and inexact; witnesses are rarely examined; papers are rarely verified by certificates or oath, and parties nominated are either unheard or heard irregularly and imperfectly. Only such information is sought or received as will enable members to form a general, unstudied opinion upon the qualifications and character of nominees. And this is supposed to be sufficient for the due performance of the duty charged upon the Senate. The actual appointment, after all, is made by the President, and he is mainly responsible to the country for the selection made.

It is found, I repeat, that the executive duties of the Senate upon appointments, although discharged in the manner described, are a serious tax upon the time and attention of the members, and interfere to some extent with the performance by them of other duties.

How would the case stand if they were required to advise and consent to removals from office? In the first place, the charges against an officer, or the causes alleged for his removal, would be laid before them in specific form. This would be necessary to their investigation of the case. Next, they would be compelled to receive evidence in some form or manner

both for and against the officer accused or sought to be removed; and as it would be monstrous to condemn him nnheard, rules for notice to him and for hearing him would have to be fixed. And as it wonld be impossible for the Senate in executive session to conduct an examination, that duty would have to be charged upon committees, and those committees armed with adequate powers for the purpose. Then would follow examinations of witnesses before committee, or the taking of their depositions in some regular manner upon commission or rule. Possibly counsel might be introduced, or the parties themselves be heard. In any case, the decision and report of a committee on a case must be subject to review and debate by the Senate, with a consumption of time, and possibly with an exasperation of debate of which members can now form no conception. A code of rules for the management of this new bnsiness must grow up or be established, and the investigations made must assnme a judicial character. If justice is to be attained, if private right is to be respected, if sonnd or safe conclusions are to be reached, both the Senate and its committees must act through judicial forms; at least through such as are everywhere held necessary to the ascertainment of truth. The accusation and the defense must be both heard; the evidence must be taken under oath and before competent anthority, and upon reasonable notice; and opportunity must be afforded for argument and for deliberation and debate.

Let no one tell me that these speculations are extravagant or chimerical because we do not enconnter intolerable difficulty or inconvenience in acting upon questions of appointment. For the reasons already stated, and for many others which might be mentioned, questions of removal are widely different from those of appointment, and they will involve senatorial duties of a different description and more arduous character—duties to which the Senate is unsuited by its very constitution as well as by the pressure of other duties upon it.

It is said that this bill may be a valuable check npon political removals from office, upon proscription for opinion's sake by the executive Department. Well, sir, it is manifest that it will not be so when the President of the United States and the majority of the Senate agree together in their political opinions. Because the responsibility of removals will then be divided between two departments of the Government instead of being charged upon one, it is more likely that proscription will be increased, that instead of the volume of proscriptive action in the Government being abated and reduced, it will be enlarged and swollen. The division of responsibility between the two departments will induce more extravagant and extensive action in pnrging all departments of the pnblic service from political opponents. Nay, sir, the political majority in the Senate itself will be apt to urge forward the President in the bnsiness of proposing to them the removal of officers of the United States subject to their joint power. This will be the case, one half the whole time or more, at all times when the President and the majority of the Senate shall agree in political sentiment and shall be inspired by common political passions and pnrposes leading to concert of conduct.

Again, when the President and the majority of the Senate shall disagree, which is the only other possible case, we shall incur the danger that the Senate, for political reasons, will keep in office persons who ought to be removed.

Mr. EDMUNDS. Allow me to ask my friend is that danger any greater in the nature of the thing than that the President for political reasons should do precisely the opposite?

Mr. BUCKALEW. It is, because at present the President may retain an improper officer in office, or, to speak to the precise point, he may retain him in office for political reasons when he ought to be removed. That is an existing inconvenience of our system. Now, what is the remedy proposed? Not that the President may not hereafter keep him in office in such a case; but that, besides that inconvenience and evil, there shall be another inconvenience and evil added to it, to wit: that the Senate shall act in the same way and for the same reason, and that instead of having a single inconvenience in the Government with regard to keeping improper officers in office for political reasons you shall have it doubled; there shall be two interests distinct, independent from each other, acting in this direction, instead of one. That will be the state of the case when the President and the majority of the Senate disagree in potitical sentiment, the alternative to the other case which I mentioned, the case when they will be agreed.

Again, sir, by this proposed system of senatorial advice and consent to removals, the President is put in the attitude of a public prosecutor before the Senate against officers of the United States whose removal may be desired by him. He is put in the position of a prosecutor to be sustained by his political friends in the Senate when they are in a majority, and to be voted down by his political opponents when they are in a majority. He is to be strengthened and encouraged in the work of proscription at one time by his political friends in the Senate, and to be deterred from, or frustrated in, the performance of his dnty at another time by his political enemies here. It must be admitted, then, that the value of this bill as a check upon political removals has been overstated and misconceived; and if the balance be struck between the good and evil to be expected from it in regard to political removals

alone, it is not at all certain that the former will be in excess.

But let us examine this senatorial "pretension" upon other grounds of expediency and policy.

In the first place, it transfers power over removals to a body of men who are less responsible than the President, both to the people and to the law. The President (notwithstanding the formalities of electors and electoral colleges) is, in fact, chosen and appointed to his high office by a popular vote taken throughout the States of the Union, and must return his trust to the people at the end of four years, to be renewed to him or the renewal withheld according to their sovereign pleasure. But the members of the Senate are chosen by the State Legislatures, and for six-year terms. One third only of its members go out biennially, and in its constitution and character it is a perpetual body. It is therefore less responsible than the President to the people. But it is also less responsible to the law, because its members cannot be impeached. It was determined in the case of Senator Blount that the House of Representatives cannot prefer articles of impeachment against a member of the Senate, and that is now an established doctrine or rule of constitutional law.

But if the Senate is to be considered a popular body, though removed in the second degree from the people, it is such upon a principle of gross inequality. Three million of population east of the Hudson have twelve representatives in the Senate, while seven millions in Pennsylvania and New York have but four. And new States and small States in other sections of the Union have power here grossly disproportioned to the populations they contain.

Upon this point of State representation in the Senate I say let the Constitution stand as it is, at least let it stand until it shall be regularly amended. As a legislative body, the Senate stands intrenched in the Constitution. But it is now proposed to extend to it (and in part by its own vote) executive powers of the most extensive and dangerous character, never heretofore assumed or exercised by it during the seventy-seven years since the Government was organized. Will its comparatively irresponsible domination over all official patronage and all executive action be satisfactory to the people? Is it expedient by this measure to invite keen scrutiny into its character and conduct, and generally into its claims to the possession of additional, delicate, and dangerous powers?

In the next place, what effect will be produced upon the Senate itself by the possession and exercise of this new power? Are the officers of the United States to be the clients of members of the Senate, as persons accused at one stage of Roman history were clients of the Senators; their retainers? What effect is to be produced upon the popular politics of the country, upon the selection of members of this body in the different State Legislatures; ay, sir, upon the purity of this body itself, when it comes to be connected, and connected intimately, with the innumerable questions concerning the retention of officers in all parts of the United States; when power is lodged here with individual members to hold men in their offices, or to instigate and assent to their removal by the President? I beg gentlemen to consider what effect is to be produced upon the character of the Senate itself by this new, portentious, unexampled jurisdiction upon which the Senate has never heretofore ventured to enter. The Senate has never set up this pretention, at least in any form of practical action, from the time when it was first denounced and branded by the father of the Constitution in the debate of 1789.

Again, consider, sir, the effect of this executive power lodged in the Senate in another point of view. It will give to this branch of the Government domination over the executive department to an extent never contemplated heretofore, and of the effects of which we are incompetent to form a distinct opinion. It was well described, perhaps, by one member of the House of Representatives, in the debate to which I have referred, when he said that a provision of this sort—I mean a provision conferring upon the Senate power over removals from office—would establish it as a two-headed monster, with a legislative and an executive head, planted here in the Government, dominating over each of the other two great departments, the President and House, one of which is united with it in the enactment of laws, and the other in their enforcement.

Upon every ground, then, upon which I have examined this measure, it is in my opinion open to insuperable objections. Instead of a measure of reform it is one of degeneracy. Instead of applying in practice a principle of the Constitution it invades that instrument. Instead of introducing purity into the Government it will be the source and parent of corruption and of evil. It treats with contempt the whole past history of this Government and the decision even of Congress itself upon a former occasion. It sets precedent at nought, while on grounds of reason it stands condemned, as I have attempted to show, by the most conclusive and indisputable arguments.

It remains only in the execution of my task to state clearly the grounds of authority against this measure. I have stated those of reason already. The Congress of the United States assembled on the 4th of March, 1789. In the Senate a quorum appeared for the first time on the 1st of April, nearly a month afterward. On the 19th of May, early in the session, in the House of Representatives, in Committee

of the Whole House on the State of the Union, Mr. Madison moved—

"That there shall be established an executive department to be denominated the Department of Foreign Affairs, at the head of which there shall be an officer to be called the Secretary to the Department of Foreign Affairs, who shall be appointed by the President, by and with the consent of the Senate, and to be removable by the President."

On the same day, after protracted debate, Mr. Bland moved to add to the motion the words "by and with the advice and consent of the Senate." The question on adding these words was put and lost. Afterward, on the same day, the question was taken and carried by a considerable majority in favor of declaring the power of removal to be in the President; that is, the motion I have already read was adopted.

In debate at that time, Mr. MADISON said:

"On the constitutionality of the declaration of presidential power I have no manner of doubt."

Mr. BENSON, another member who supported it, said:

"This clause would be a mere legislative construction of the Constitution."

Mr. VINTON, another and a leading member of the House—

"Had no doubt but the Constitution gave this power to the President; but if doubt were entertained he thought it prudent to make a legislative declaration of the sentiments of Congress on this point."

There were prolonged debates upon this subject.

"On the 19th of June, on a motion to strike out the words 'to be removable by the President,' the question being taken, the motion was rejected—yeas 20, nays 34.

"On the 22d of June, Mr. BENSON moved to amend by inserting the words 'whenever the said principal officer shall be removed from office by the President of the United States, or in any other case of vacancy.' This was carried—yeas 30, nays 18.

"Then the words 'to be removable by the President' were, on motion of Mr. BENSON, struck out—yeas 31, nays 19."

These latter motions were made for the purpose of avoiding an argument which had been made against the measure by its opponents, to wit: that by saying in the bill itself that this officer should be removed by the President, it would be inferred that Congress conferred the power upon him, and therefore the phraseology was changed deliberately by the friends of the presidential power, and the bill was made simply to declare that when the President should remove the officer, or in any other case of vacancy, the office should be filled by the chief clerk; so that there should be upon the face of the statute an express recognition by Congress of the President's power of removal under the Constitution. The debate shows that a new form was given to the measure for the express purpose of excluding in all future time and from any quarter any allegation that the President derived his power from the legislation of Congress. That bill finally passed the House on the 24th of June, by a vote of—yeas 29, nays 22.

Now, sir, I propose to read from the debates attending the passage of the measure, the history of which I have traced, certain opinions of prominent men upon the point mentioned by me in the outset of my remarks. I mean the question of the right of the Legislature to confer upon the Senate and President jointly this power of removing from office. That point was suggested, and Mr. Madison replied as follows:

"Several constructions have been put upon t Constitution relative to the point in question. T gentleman from Connecticut [Mr. SHERMAN] l advanced a doctrine which was not touched up before. He seems to think (if I understood him right that the power of displacing from office is subject legislative discretion; because, it having a right create, it may limit or modify as it thinks proper. shall not say but at first view this doctrine may se to have some plausibility. But when I consider tl the Constitution clearly intended to maintain marked distinction between the legislative, exe tive, and judicial powers of Government; and whe consider that if the Legislature has a power, such a contended for, they may subject and transfer at c cretion powers from one department of our Gove ment to another; they may on that principle excl the President altogether from exercising any auth ity in the removal of officers; they may give it to Senate alone, or the President and Senate combin they may vest it in the whole Congress, or they n reserve it to be exercised by this House. Whe consider the consequence, of this doctrine and c pare them with the true principles of the Consti tion, I own that I cannot subscribe to it."—*An of Congress*, vol. i, p. 496.

Mr. Gerry, of Massachusetts, one of the m distinguished men of that age, said upon t same subject:

"This has been supposed by some gentlemen t an omitted case"—

That is, this power of removal—

" and that Congress have the power of supplying defect, Let gentlemen consider the ground on wl they tread. If it is an omitted case, an attemp the Legislature to supply the defect will be in fac attempt to amend the Constitution. But this only he done in the way pointed out by the fifth ticle of that instrument, and an attempt to amer in any other way may be a high crime or mi meanor, or perhaps something worse."—*Ibid.*, p.

And he goes on with a further argumen support of the same view. Again, he said a subsequent stage of the debate:

" If the Legislature have not the power of removal they cannot confer it upon others; if they have it, it is a legislative power, and they have no right to transfer the exercise of it to any other body. So view this question in whatever point of light you please, it is clear the words ought to be struck out."—*Ibid.*, p. 576.

Mr. Smith, of South Carolina, said:

"It is contended that the Legislature have the power of supplying the defect if this is an omitted case. I cannot be of that opinion. But it is unnecessary to extend this argument after what has been urged by the gentleman from Massachusetts, [Mr. GERRY.] If the Legislature can supply defects, they may virtually repeal the Constitution."—*Ibid.*, p. 508.

Mr. White, of Virginia, said:

"Some gentlemen have supposed that the Constitution has made no provision for the removal of

officers; and they have called it an omitted case or defect. They ask if we may not supply that defect? I say in general we may not; for if we can assume the right of supplying defects and making alterations, we may go on and make the Constitution just what we please."—*Ibid.*, p. 517.

Finally, I will read the opinion of Mr. Boudinot. He said:

"For my part, I conceive it is impossible to carry into execution the powers of the President in a salutary manner unless he has the power of removal vested in him. I do not mean that if it was not vested in him by the Constitution it would be proper for Congress to confer it; though I do believe the Government would otherwise be very defective, yet we would have to bear this inconvenience until it was rectified by an amendment of the Constitution. For my part, I would adhere to every principle contained in it, however defective, and not infringe it for any purpose whatever."—*Ibid.*, p. 529.

So much for that question. From the same debates I propose to read so much as will show the grounds upon which the majority acted at that time. In the first place I read the opinion of George Clymer, a Representative from Pennsylvania, who said on the 19th of May, 1789:

"The power of removal was an executive power, and as such belonged to the President alone by the express words of the Constitution: 'the executive power shall be vested in a President of the United States of America.' The Senate were not an executive body; they were a legislative one. It was true, in some instances, they held a qualified check over the executive power, but that was in consequence of an express declaration in the Constitution; without such declaration they would not have been called upon for advice and consent in the case of appointment. Why, then, shall we extend their power to control the removal which is naturally in the Executive, unless it is likewise expressly declared in the Constitution?"—*Ibid.*, p. 382.

I will conclude these extracts by reading what Mr. Madison said in the debate on the 17th of June, and at other times, in vindication of his own position and in answer to the argument in favor of senatorial power:

"But let us not consider the question on one side only; there are dangers to be contemplated on the other. Vest this power in the Senate jointly with the President, and you abolish at once that great principle of unity and responsibility in the executive department which was intended for the security of liberty and the public good. If the President should possess alone the power of removal from office, those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest will depend, as they ought, on the President, and the President on the community. The chain of dependence therefore terminates in the supreme body, namely, in the people, who will possess, besides, in aid of their original power, the decisive engine of impeachment. Take the other supposition; that the power should be vested in the Senate, on the principle that the power to displace is necessarily connected with the power to appoint. It is declared by the Constitution that we may by law vest the appointment of inferior officers in the heads of Departments; the power of removal being incidental as stated by some gentlemen. Where does this terminate? If you begin with the subordinate officers, they are dependent on their superior, he on the next superior, and he on—whom? On the Senate, a permanent body; a body, by its particular mode of election, in reality existing forever; a body possessing that proportion of aristocratic power which the Constitution no doubt thought wise to be established in the system, but which some have strongly excepted against. And let me ask gentlemen, is there equal security in this case as in the other? Shall we trust the Senate, responsible to individual Legislatures, rather than the person who is responsible to the whole community? It is true the Senate do not hold their offices for life, like aristocracies recorded in the historic page; yet the fact is, they will not possess that responsibility for the exercise of executive powers which would render it safe for us to vest such powers in them. [illegible] what an aspect will this give to the Executive? Instead of keeping the departments of Government distinct, you make an executive out of one branch of the Legislature; you make the Executive a two-headed monster, to use the expression of the gentleman from New Hampshire, [Mr. Livermore,] you destroy the great principle of responsibility, and perhaps have the creature divided in its will, defeating the very purposes for which a unity in the executive was instituted. These objections do not lie against such an arrangement as the bill establishes. I conceive that the President is sufficiently accountable to the community; and if this power is vested in him, it will be vested where its nature requires it should be vested; if anything in its nature is executive, it must be that power which is employed in superintending and seeing that the laws are faithfully executed. The laws cannot be executed but by officers appointed for that purpose; therefore, those who are over such officers naturally possess the executive power. If any other doctrine be admitted, what is the consequence? You may set the Senate at the head of the executive department, or you may require that the officers hold their places during the pleasure of this branch of the Legislature, if you cannot go so far as to say we shall appoint them; and by this means you link together two branches of the Government which the preservation of liberty requires to be constantly separated."
[*Ibid.*, pp. 499, 500.

Again he said:

"The Constitution affirms that the executive power shall be vested in the President. Are these exceptions to this proposition? Yes, there are. The Constitution says that in appointing to office the Senate shall be associated with the President unless in the case of inferior officers when the law shall otherwise direct. Have we a right to extend this exception? I believe not. If the Constitution has invested all the executive power in the President, I venture to assert that the Legislature has no right to diminish or modify his executive authority. The question then resolves itself into this: is the power of displacing an executive power? I conceive that if any power whatsoever is in its nature executive it is the power of appointing, overseeing, and controlling those who execute the laws."—*Ibid.*, p. 463.

Mr. President, I have but one additional citation to make, and I shall then relieve the Senate from these copious extracts in which I have indulged. I read from the protest of Andrew Jackson, dated April 15, 1834, and directed to the Senate of the United States, the extract being upon the very question involved in this debate, the very question raised by this bill. He says:

"The executive power vested in the Senate is neither that of 'nominating' nor 'appointing.' It is merely a check upon the executive power of appointment. If individuals proposed for appointment by the President are by them deemed incompetent or unworthy, they may withhold their consent, and the appointment cannot be made. They check the action of the Executive, but cannot, in relation to those very subjects, act themselves, nor direct him. Selections are still made by the President, and the negative given to the Senate without diminishing responsibility furnishes an additional guarantee to the country that the subordinate executive as well as the judicial offices shall be filled with worthy and competent men.

"The whole executive power being vested in the

President, who is responsible for its exercise, it is a necessary consequence that he should have a right to employ agents of his own choice to aid him in the performance of his duties and to discharge them when he is no longer willing to be responsible for their acts. In strict accordance with this principle the power of removal, which, like that of appointment, is an original executive power, is left unchecked by the Constitution in relation to all executive officers, for whose conduct the President is responsible, while it is taken from him in relation to judicial officers, for whose acts he is not responsible. In the government from which many of the fundamental principles of our system are derived, the head of the executive department originally had power to appoint and remove at will all officers, executive and judicial. It was to take the judges out of this general power of removal, and thus make them independent of the Executive, that the tenure of their offices was changed to good behavior. Nor is it conceivable why they are placed in our Constitution upon a tenure different from that of all other officers appointed by the Executive unless it be for the same purpose.

"But if there were any just ground for doubt on the face of the Constitution, whether all executive officers are removable at the will of the President, it is obviated by the contemporaneous construction of the instrument and the uniform practice under it.

"The power of removal was a topic of solemn debate in the Congress of 1789 while organizing the administrative departments of the Government, and it was finally decided that the President derived from the Constitution the power of removal, so far as it regards that department for whose acts he is responsible. Although the debate covered the whole ground, embracing the Treasury as well as all the other executive departments, it arose on a motion to strike out of the bill to establish a Department of Foreign Affairs, since called the Department of State, a clause declaring the Secretary 'to be removable from office by the President of the United States.'"

And then proceeds in explanation of the subsequent proceedings on that bill as I have already read them from the original record. He proceeds:

"This change having been made for the express purpose of declaring the sense of Congress that the President derived the power of removal from the Constitution, the act as it passed has always been considered as a full expression of the sense of the legislature on this important part of the American Constitution.

"Here, then, we have the concurrent authority of President Washington, of the Senate, and the House of Representatives, numbers of whom had taken an active part in the Convention which framed the Constitution and in the State conventions which adopted it, that the President derived an unqualified power of removal from that instrument itself, which is beyond the reach of legislative authority.' Upon this principle the Government has now been steadily administered for about forty-five years, during which there have been numerous removals made by the President or by his direction, embracing every grade of executive officers, from the heads of Departments to the messengers of bureaus."

The argument is then carried on and applied to the particular case upon which disagreement had arisen between himself and the Senate, to wit: the case of the head of the Treasury Department, the incumbent of which had been dismissed by him in the recess in connection with the well-known question regarding the removal of the deposits.

I have thus gone over, in the first place, the leading points of the argument from the point of view in which the subject has presented itself to my mind; and next, I have shown by the authorities cited how those views and opinions supported by me are rooted and founded in the strongest authority which our political history can furnish; that this authority begins with the organization of the Government, and that along with it is to be taken the uniform practice of the Government for a period of seventy-seven years. President Jackson expressed his surprise in 1834 that, after a period of forty-five years, in which the practice of the Government had been in a certain direction, it should be called in question. How much more reason have we in 1867 to express surprise that a question which has stood determined for seventy-seven years, and the determination of which is sustained by uniform practice and by the highest authorities, should now be involved in debate!

Why is this? Has there been any demand of public opinion brought to bear upon us on this particular point? Has any new light from any quarter been shed upon the Constitution? Why is this bill introduced, and why is it pressed? There is but one explanation. The reason is avowed. It is not concealed; it is not held back. It is, that the President of the United States is not in complete political accord with the majority of the Senate, and therefore this bill is to be passed to put a bit into his mouth to curb and to check him, to prevent him from exercising a power which has been exercised almost unquestioned by all his predecessors. Sir, if I am correct in my argument, and if the great men of former times were correct in their views on this subject, you have no power to pass this bill even for the high object avowed of curbing, limiting, and restraining the President of the United States in the exercise of his powers.

But is there such pressing necessity that we ought to overleap all practice and set aside the past construction of the Constitution? Why, sir, after all that has happened, after all that has been said, there can be no question that two thirds of the offices of the United States, even in the adhering States—the States which did not rebel—are held by persons who are in accord with the political majority in the Senate. This thing of removals has not been carried to such lengths that it is necessary to resort to extreme and doubtful measures of legislation in order to find security and relief to an oppressed majority in this Chamber; and there is no such necessity impending. As was well said by the Senator from Wisconsin [Mr. HOWE] in this very debate, the exercise of this power of removal by the present President has not been carried to such an extent as it was by former ones. No political proscription of officers in this country was ever carried to greater lengths than it was carried by President Lincoln and those associated with him in

the executive branch of this Government. This power—I acknowledge it to be a fearful, a terrible power in the hands of one disposed to abuse it—was wielded by him and his political associates with an absence of all consideration for opposing opinion and private interests which had no example in our previous political history. It was wielded strongly and with power by that man of iron from whose protest I have read to you, and by other Presidents. I repeat there is less reason now, upon the ground alleged by the advocates of this bill for its enactment, than there was for such a measure upon many former occasions, some of them recent and others more remote.

Why, then, is this measure introduced to revolutionize the practice of the Government and to unsettle the fixed and declared opinions of the American people and of their authorities upon this question? Is it because gentlemen suppose that the public mind is so unfixed by revolution, by war, and by the passions of this war that it will assent to anything demanded by party interests or instigated by party passion? Is it under the inspiration of popular elections held and determined upon other considerations than this that we are to see the inauguration of a new system in our Government with reference to the patronage of the Government, which changes altogether the relations of the legislative and executive departments with each other; which puts this Senate at the head of the executive department to dominate it; which makes it the two-headed monster which was spoken of in the debate of 1789?

I beg Senators to reflect upon the several points elaborated by me against the deposition of this power in the Senate, independent of the question of power. I beg them to consider the irresponsibility of this body, an appropriate fact enough when you consider the Senate in its legislative capacity as a check upon the popular House, as a sort of breakwater against the popular passions of any particular year. It is to stand here and perform in this Government the same function which is performed in the British Government by the House of Lords. It is to check and to hold in restraint popular impulses when they first appear, and when they may carry the Government out of its course and establish injustice or mischief in its administration. That is the great function of the Senate. It is a check upon the hot and heady passions which may hold sway over the other branch of the legislative department. But, sir, never in theory or in practice was it intended that this Senate should dominate the executive department. You have a complete veto upon the House. No bill or resolution passed by that branch can take effect or have force as a public law or regulation until you assent to it. The House cannot overrule your dissent to a measure as Congress can overrule a presidential veto. You hold by a fast grip that popular branch which speaks the heart of the people and speaks the passions of the people whenever their rashness or injustice require a check.

It may be said that the Senate is the aristocratic feature of the Constitution, and it may be said, as it was said in the Convention of 1787, that it is objectionable for this reason, and that it ought not to be admitted into the Constitution. On the contrary, I think the provisions creating it were among the wisest provisions of the Constitution, that the Senate should be constituted as it is, that here calm thought and just action should take refuge against the passions of the time. But to have a Senate performing its appropriate, constitutional functions, holding this Government steady in its course, protecting it against impulse and passion and violence, you must have it as the Constitution made it, and as it has heretofore existed, a body substantially separated from questions of private emolument, from questions of official patronage and management. As can be shown, your action upon appointments does not constitute efficient control of or active participation in executive power. You must not have the officers of this country tied to the skirts of Senators and pulling upon them. You must not run the risk of a corrupt influence upon this body. You must not make it an interested participant in the hot, ardent discussions of the country with reference to these questions of patronage.

Then, sir, keeping it separate, as it has been heretofore, allowing it only when important officers are to be selected by the executive department to express its opinion, not to go into investigations such as would be necessary in cases of removal, it will perform its appropriate functions and preserve its just influence. Selected as its members are from every State of the Union, they have a general knowledge of character and of competency in men who are to be selected for public stations, and when the President asks their opinion or advice they can give it in a summary manner. This power of advice gives dignity to the proceedings of Government; but the Senate does not select these officers. Ordinarily, it does not reject them. It is a power not odious; it is a power which does not connect the Senate too intimately with questions of money and office, but leaves its dignity intact and its influence unbroken. I desire it to maintain its character, to be what it was intended to be, the great House of the States, where their voice shall be spoken and their will and their opinions upon public affairs maintained; that it shall not be an active instrument in the scrambles for office in the country; that it shall not be tied to the

nterests of men who hold lucrative positions nder the Government; that it shall not at- empt to dictate to the President whom he shall elect for office, because that will be the effect f giving new power over removals; that men hall not come here and through Senators dic- e appointments and removals to the execu- ive department; that you shall not render that department contemptible; and finally, that you shall not extend to this branch of the Legislature a jurisdiction which it cannot exercise without public odium, without a loss of its own dignity, nor without injury to that system of government which we are all bound, so far as our efforts will go, to maintain in its original integrity and in its former luster.